RECEIVED
SEP 19 1979
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

# Supreme Court of the United States

OCTOBER TERM, 1979
NO. 79-460

EDGAR SANCHEZ,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK

---

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

---

SPIROS A. TSIMBINOS
Of Counsel to
SALAWAY and SCHREIBER
Attorneys for Petitioner
Office & P. O. Address
125-10 Queens Boulevard
Kew Gardens, New York 11415
Telephone: (212) 699-6110

September, 1979

(9134)

COUNSEL PRESS, INC., 55 West 42nd Street, New York, N.Y. 10036 • (212) 391-6622

## INDEX TO PETITION


| | Page |
|---|---|
| Opinions Below..... | 2 |
| Jurisdiction..... | 3 |
| Questions Presented..... | 3 |
| Constitutional Provisions and Statutes Involved..... | 4 |
| Statement of the Case..... | 4 |
| Conclusion..... | 9 |
| APPENDIX A - Decision and Order of Justice Goodman in the Supreme Court, New York County, August 23, 1977.... | 1a |
| APPENDIX B - Order of the Appellate Division, First Department, of the Supreme Court of the State of New York, May 10, 1979. | 2a |
| APPENDIX C - Opinion of the Court of Appeals of the State of New York Denying Leave to Appeal..... | 4a |
| APPENDIX D - New York State Criminal Procedure Law, sections 710.60 and 710.70.. | 5a |




## CASES CITED


| | Page |
|---|---|
| Adams v Williams, 407 US 146..... | 8 |
| Dibella v United States, 369 US 126 (1962)..... | 6 |
| Johnson v Zerbst, 304 US 458..... | 6 |
| People v Butler, 415 P.2d 819 (Cal. Sup Ct., 1966)..... | 7 |
| People v Ingle, 36 NY2d 413..... | 8 |
| People v Lypka, 36 NY2d 210..... | 8 |
| People v Moore, 32 NY2d 67..... | 8 |
| Rouse v United States, 359 F2d 1014 (1966)..... | 7 |
| Terry v Ohio, 392 US 1..... | 8 |

IN THE
SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1979

---

NO.

---

EDGAR SANCHEZ,

Petitioner,

- against -

THE PEOPLE OF THE STATE OF NEW YORK

---

PETITION FOR A WRIT OF CERTIORARI TO THE APPELLATE DIVISION, FIRST DEPARTMENT OF THE SUPREME COURT OF THE STATE OF NEW YORK

---

To the Honorable The Chief Justice, and Associate Justices of the Supreme Court of the United States:

Edgar Sanchez, petitioner herein, respectfully prays that a writ of certiorari be issued to review an order of the Appellate Division, First Department, of the Supreme Court of the State of New York, which affirmed a judgment of the Supreme Court, New York County, convicting the petitioner of the crimes of Criminal Possession of a Controlled Substance in the Fifth and Seventh Degrees



under sections 220.09 and 220.03 of the New York Penal Law.

Petitioner was arrested on January 13, 1977. A trial was held commencing March 30, 1978 and the petitioner was convicted as charged by a jury verdict. He was thereafter sentenced to terms of up to three years and one year to run concurrently. The petitioner's conviction was affirmed by the Appellate Division, First Department, on May 10, 1979. Leave to appeal to the New York Court of Appeals was denied on June 22, 1979. The petitioner has now exhausted all state remedies.

## OPINIONS BELOW

The opinion and order of Judge Goodman with respect to the petitioner's pretrial motion to suppress evidence is not officially reported. A copy is set forth in Appendix A. The Appellate Division's affirmance of the petitioner's conviction was without opinion, and a copy of the order is set forth in Appendix B. The order of the New York Court of Appeals denying leave to appeal is set forth in Appendix C. The Appellate Division and New York Court of Appeals orders have not yet been officially reported.

## JURISDICTION

The Appellate Division's order was entered on May 10, 1979. The order of the New York Court of Appeals denying leave to appeal was dated June 22, 1979. The petitioner is therefore timely filing this application for a writ of certiorari and jurisdiction of this Court is invoked pursuant to Title 28 U.S.C., Section 1257(3).

## QUESTIONS PRESENTED

1. Whether the stopping of the petitioner's vehicle by police and the subsequent attempted search of his person, based solely upon information of an anonymous informant that "a male Puerto Rican driving a white Grand Prix Pontiac with a black top would be carrying a gun" was violative of the petitioner's constitutional rights against unreasonable search and seizure.

2. Whether the failure of petitioner to fully comply with New York statutory procedures for obtaining a pretrial hearing on an alleged violation of constitutional rights constitutes a waiver of those rights even though the issue was fully raised and developed during the course of the trial.



## CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitutional provisions involved in this case are the Fourth and Fourteenth Amendments to the United States Constitution. Statutes involved are sections 710.60 and 710.70 of the New York State Criminal Procedure Law.

## STATEMENT

In the case at bar defense counsel prior to trial, in a motion dated May 24, 1977, requested a suppression hearing on the issue of improper search and seizure of physical items pursuant to applicable sections of the New York Criminal Procedure Law. The prosecution, in a reply affidavit, opposed said request on the grounds that the "supporting affidavit by defense counsel did not raise issues of fact such as to put in issue the question of a possible violation of constitutional rights". In addition, the assistant district attorney argued that "there were no sworn allegations of fact". Judge Goodman, of the New York State Supreme Court, in an order of August 23, 1977, evidently relying on the district attorney's argument, denied the motion to suppress, stating that "there are no facts raised by the defense to warrant a suppression of evidence". The

court granted leave to renew upon a proper showing of issues of fact. (See order of Judge Goodman - Appendix A).

During the trial defense counsel learned for the first time, from a statement by the assistant district attorney, that the only reason that appellant had been stopped by the police officers was information that they had received from someone that the appellant was carrying a gun (Trial Min., p 2). Later in the trial, during cross-examination of Sergeant Forzano, defense counsel learned that the sum total of information from an anonymous informant was that "a male Puerto Rican driving a white Grand Prix Pontiac with a black top would be carrying a gun" (Trial Min., pp 156,157). Based upon this discovery defense counsel raised for the trial court's consideration the impropriety of the initial stopping of the vehicle and the attempted search of the appellant's person* (Trial Min., pp 181-187). Defense counsel aptly pointed out that since his client's position was that he had not possessed any drugs, neither he nor his client were in any position prior to learning of Sergeant Forzano's testimony to know upon what basis the officers initially decided to stop his vehicle.

---

* Detective Mauriello clearly stated that he made a move toward Sanchez with the intention of frisking him (Trial Min., p 36).



Thus defense counsel argued that the initial denial of his motion was based upon the impossible requirement that he disclose alleged facts which were not within his knowledge. During the course of the trial, defense counsel specifically told the court that "the issue of the legality of the search is always before the court" (Trial Min., p 186). The State Courts below in reviewing the case at bar appear to have adopted the prosecutor's argument that the failure to precisely follow statutory procedures as outlined in section 710.60 of the Criminal Procedure Law of New York constitutes a waiver of petitioner's rights.

Petitioner thus seeks review by this Court in a writ of certiorari because of the novel issue of waiver presented herein. This Court has always set high standards of proof with respect to waiver of constitutional rights. See Johnson v Zerbst, 304 US 458. In the case at bar, the issue of an illegal search and seizure was clearly raised at trial by defense counsel and through the testimony of police officers who testified.

In Dibella v United States, 369 US 126 (1962), this Court clearly indicated in its opinion that the legality of a search can always be raised even during the course of the trial. This Court stated at page 129:

> " . . . the legality of the search too often cannot truly be determined until the evidence at the trial has brought all circumstances to light." (Citing In re Milburne, 77 F2d 310 (1935) and Grant v United States, 291 F2d 227 (1961).)

In Rouse v United States, 359 F2d 1014 (1966), the Court of Appeals for the District of Columbia relying on the Dibella case, supra, stated at pages 1015-16:

> "(1) A pre-trial ruling on a motion to suppress does not bind the trial judge in all circumstances. New facts, new light on the credibility of government witnesses, or other matters appearing at trial may cast reasonable doubt on the pre-trial ruling. It then becomes the duty of the trial judge to consider de novo the issue of suppression and, if necessary, hold a hearing out of the presence of the jury."

(See, also, People v Butler, 415 P.2d 819 (Cal Sup Ct., 1966).)



In the case at bar, the facts indicating that an illegal search and seizure had taken place did not appear until the testimony of police officers at trial. Their testimony that the sole reason for stopping the petitioner was information from an anonymous informant that "a male Puerto Rican driving a white Grand Prix Pontiac with a black top would be carrying a gun" (Trial Min., pp 156,157), clearly reveals an insufficient basis to support the police conduct in the case at bar. Although an investigative stop requires less than probable cause and may be made on information supplied by another person, an informant's tip must carry sufficient indication of reliability to justify the forcible encounter. (Adams v Williams, 407 US 146; People v Moore, 32 NY2d 67; People v Lypka, 36 NY2d 210).

In the case at bar the petitioner was ordered to halt his vehicle, all three officers surrounded his car, he was asked for his license and registration and Detective Mauriello specifically testified that he "made a move toward the petitioner with the intention of frisking him (Trial Min., pp 35,36). Thus, in effect, the petitioner and his vehicle were literally accosted, restrained and seized. (Terry v Ohio, 392 US 1; People v Ingle, 36 NY2d 413). This intrusion upon an individual's liberty occurred

on insufficient grounds to satisfy constitutional requirements.

It is respectfully urged that the case at bar presents important and novel issues which warrants this Court's further consideration.

## CONCLUSION

THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE GRANTED.

Respectfully submitted,

SPIROS A. TSIMBINOS
Of Counsel to
SALAWAY and SCHREIBER
Attorneys for Petitioner
Office and P. O. Address
125-10 Queens Boulevard
Kew Gardens, N. Y. 11415
Telephone:(212) 699-6110



## APPENDIX A -

DECISION AND ORDER OF JUSTICE GOODMAN IN THE SUPREME COURT, NEW YORK COUNTY, AUGUST 23, 1977.

At a Criminal Term of the Supreme Court of the State of New York, held in and for the County of New York, City of New York, on the 23rd day of August, 1977.

PRESENT:
HON. BUDD GOODMAN
Justice

Indictment No. N1433/77
Motion To Suppress Evidence
(SAME TITLE)

The motion to suppress physical evidence is denied. There are no facts raised by the defense to warrant a suppression of evidence; however, leave to renew the motion may be granted upon a proper showing of issues of fact.

E N T E R

s/ B. G.
J.S.C.

APPENDIX B -

ORDER OF THE APPELLATE DIVISION, FIRST DEPARTMENT, OF THE SUPREME COURT OF THE STATE OF NEW YORK, MAY 10, 1979.

At a term of the Appellate Division of the Supreme Court held in and for the First Judicial Department in the County of New York, on 10th day of May, 1979

Present-Hon. Harold Birns, Justice Presiding
Arnold L. Fein
Leonard H. Sandler
Max Bloom
Myles J. Lane Justices

The People of the State of New York,

Respondent,

-against-

Edgar Sanchez,

Defendant-Appellant.

An appeal having been taken to this Court by the defendant-appellant from the judgment of the Supreme Court, New York County (Dickens, J., at trial and sentence; Goodman, J., on motion to suppress), rendered on May 31, 1978 convicting defendant of criminal possession of a controlled substance in the fifth and seventh degrees,



and said appeal having been argued by Mr. Spiros A. Tsimbinos of counsel for the appellant, and by Mr. Michael E. Norton of counsel for the respondent; and due deliberation having been had thereon,

It is unanimously ordered and adjudged that the judgment so appealed from be and the same is hereby, in all things, affirmed. The case is remitted to the Supreme Court, New York County, for further proceedings pursuant to CPL 460.50(5).

ENTER:

JOSEPH J. LUCCHI

Clerk.

APPENDIX C -

OPINION OF THE COURT OF APPEALS
OF THE STATE OF NEW YORK DENYING LEAVE
TO APPEAL.

BEFORE:HON. SOL WACHTLER, Associate Judge

---

THE PEOPLE OF THE STATE OF NEW YORK

against

EDGAR SANCHEZ

---

CERTIFICATE DENYING LEAVE

I, SOL WACHTLER, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Mineola, New York
June 22, 1979

s/ Sol Wachtler
Associate Judge

*Description of Order: Judgment of Supreme Court, New York County, May 31, 1978; affirmed and case remitted to Supreme Court, for further proceedings pursuant to CPL 460.50(5), Appellate Division, First Department, May 10,1979.



APPENDIX D -

New York State Criminal Procedure Law, section 710.60:

1. A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must state the ground or grounds of the motion and must contain sworn allegations of fact, whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers.

2. The court must summarily grant the motion if:

(a) The motion papers comply with the requirements of subdivision one and the people concede the truth of allegations of fact therein which support the motion; or

(b) The people stipulate that the evidence sought to be suppressed will not be offered in evidence in any criminal action or proceeding against the defendant.

3. The court may summarily deny the motion if:

(a) The motion papers do not allege a ground constituting legal basis for the motion; or

(b) The sworn allegations of fact do not as a matter of law support the ground alleged; except that this paragraph does not apply where the motion is based upon the ground specified in subdivision three of section 710.20.

4. If the court does not determine the motion pursuant to subdivisions two or three, it must conduct a hearing and make findings of fact essential to the determination thereof. All persons giving factual information at such hearing must testify under oath, except that unsworn evidence pursuant to subdivision two of section 60.20 of this chapter may also be received. Upon such hearing, hearsay evidence is admissible to establish any material fact.

5. A motion to suppress evidence made during trial may be in writing and may be litigated and determined on the basis of motion papers as provided in subdivisions one through four, or it may, instead, be made orally in open court. In the latter event, the court must, where necessary, also conduct a hearing as provided in subdivision four, out of the presence of the jury if any, and make findings of fact essential to the determination of the motion.



6. Regardless of whether a hearing was conducted, the court, upon determining the motion, must set forth on the record its findings of fact, its conclusions of law and the reasons for its determination.

* * * * * *

New York State Criminal Procedure Law, section 710.70:

1. Upon granting a motion to suppress evidence, the court must order that the evidence in question be excluded in the criminal action pending against the defendant. When the order is based upon the ground specified in subdivision one of section 710.20 and excludes tangible property unlawfully taken from the defendant's possession, and when such property is not otherwise subject to lawful retention, the court may, upon request of the defendant, further order that such property be restored to him.

2. An order finally denying a motion to suppress evidence may be reviewed upon an appeal from an ensuing judgment of conviction notwithstanding the fact that such judgment is entered upon a plea of guilty.

3. A motion to suppress evidence made pursuant to this article is the exclusive method of challenging the admissibility of evidence upon the grounds specified

in section 710.20, and a defendant who does not make such a motion before or in the course of a criminal action waives his right to judicial determination of any such contention.

Nothing contained in this article, however, precludes a defendant from attempting to establish at a trial that evidence introduced by the people of a pre-trial statement made by him should be disregarded by the jury or other trier of the facts on the ground that such statement was involuntarily made within the meaning of section 60.45. Even though the issue of the admissibility of such evidence was not submitted to the court, or was determined adversely to the defendant upon motion, the defendant may adduce trial evidence and otherwise contend that the statement was involuntarily made. In the case of a jury trial, the court must submit such issue to the jury under instructions to disregard such evidence upon a finding that the statement was involuntarily made.

DISTRIBUTED
NOV 8 1979

Supreme Court, U.S.
FILED
NOV 8 1979
MICHAEL RODAK, JR., CLERK

IN THE

# Supreme Court of the United States

**October Term, 1979**

**No. 79-460**

EDGAR SANCHEZ,

*Petitioner,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROBERT M. MORGENTHAU
*District Attorney*
New York County
*Attorney for Respondent*
155 Leonard Street
New York, New York 10013
(212) 553-9000

MARK DWYER
Assistant District Attorney

MICHAEL E. NORTON
Special Assistant District Attorney

*Of Counsel*

# TABLE OF CONTENTS


| | PAGE |
|---|---|
| Table of Authorities | ii |
| Statement of the Case | 1 |
| The Motion to Suppress | 2 |
| The Evidence at Trial | 4 |
| The People's Case | 4 |
| The Defendant's Case | 6 |
| The Appeal | 7 |
| Point I—This Court lacks jurisdiction to review the questions presented by the petition. In any event, those questions present no issue deserving of review in this Court | 7 |
| Conclusion | 11 |
| Appendix | A1 |

## TABLE OF AUTHORITIES


PAGE

***Cases:***

Bailey v. Anderson, 326 U.S. 203 (1945) ..... 8

Cohen v. United States, 378 F.2d 751 (9th Cir.), *cert. denied,* 389 U.S. 897 (1967) ..... 11

Delaware v. Prouse, 99 S.Ct. 1391 (1979) ..... 10

Fox Film Corp. v. Muller, 296 U.S. 207 (1935) ..... 8

Henry v. Mississippi, 379 U.S. 443 (1965) ..... 9

Michigan v. Tyler, 436 U.S. 449 (1978) ..... 9
Monger v. Florida, 405 U.S. 958 (1972) ..... 9

People v. Berrios, 28 N.Y.2d 361, 321 N.Y.S.2d 884 (1971) ..... 4, 8
People v. Esajerre, 35 N.Y.2d 463, 363 N.Y.S.2d 931 (1974) ..... 4, 7
People v. Glen, 30 N.Y.2d 252, 331 N.Y.S.2d 656, *cert. denied,* 409 U.S. 849 (1972) ..... 4
People v. Ingle, 36 N.Y.2d 413, 369 N.Y.S.2d 67 (1975) 10
People v. Leonard, 33 App. Div. 2d 1010, 308 N.Y.S.2d 77 (1st Dep't), *aff'd,* 27 N.Y.2d 959, 318 N.Y.S.2d 496 (1970) ..... 4
People v. Sobotker, 43 N.Y.2d 559, 402 N.Y.S.2d 993 (1978) ..... 10
People v. Solimine, 18 N.Y.2d 477, 276 N.Y.S.2d 882 (1966) ..... 4

Stembridge v. Georgia, 343 U.S. 541 (1952) ..... 8
Street v. New York, 394 U.S. 576 (1969) ..... 8, 10

United States v. Culotta, 413 F.2d 1343 (2d Cir. 1969), *cert. denied,* 396 U.S. 1019 (1970) ..... 11

Wainwright v. Sykes, 433 U.S. 72 (1977) ..... 9, 11





PAGE

***Other Authorities:***

New York Criminal Procedure Law
§ 710.60 ..... 3, 4, 7, 10
§ 710.70 ..... 4

New York Penal Law
§ 220.05 ..... 1
§ 220.09 ..... 1

28 U.S.C. § 1257(3) ..... 8

Supreme Court Rules
Rule 21(1)(f) ..... 8

Wright, *Federal Practice and Procedure:*
Criminal § 675 (1969) ..... 11

IN THE

# Supreme Court of the United States

**October Term, 1979**

**No. 79-460**

EDGAR SANCHEZ,

*Petitioner,*

*against*

THE PEOPLE OF THE STATE OF NEW YORK,

*Respondent.*

## BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

### Statement of the Case

While attempting to flee on foot from two police officers who had stopped his car, petitioner discarded in view of the pursuing officers a tinfoil ball containing 66 packets of cocaine and five packets of heroin. The ball was immediately recovered by one of the policemen and petitioner was soon thereafter apprehended and arrested. Petitioner was indicted and charged with the crimes of Criminal Possession of a Controlled Substance in the Fifth and Seventh Degrees (N.Y. Penal Law §§ 220.09 and 220.05).

Petitioner subsequently made a motion for a hearing to suppress physical evidence. That motion was denied, with leave to petitioner to renew the motion upon a proper showing of issues of fact. Petitioner was tried by a jury

and convicted of both charges against him. Petitioner was sentenced to an indeterminate term of imprisonment not to exceed three years for fifth degree possession and to a definite sentence of one year for seventh degree possession, both sentences to run concurrently. The judgment against petitioner was affirmed without opinion in the Appellate Division, First Department, of the New York Supreme Court, and leave for a further appeal to the New York Court of Appeals was denied.

In his petition for certiorari, petitioner asks that this Court review whether the police officers who stopped his car violated his Fourth Amendment rights. Petitioner also asks this Court to determine whether his rights were violated by a State procedural rule which provides that a defendant must set forth sworn allegations of fact making out a Fourth Amendment violation before he is entitled to a suppression hearing.

## The Motion to Suppress

Prior to trial, petitioner filed an omnibus motion* which included a request for a pre-trial hearing to determine whether any "tangible personal property" obtained by the police should be suppressed because obtained by an unlawful search and seizure. The affirmation of petitioner's attorney attached to the notice of motion failed to set forth any factual allegations concerning the circumstances surrounding petitioner's arrest or the recovery of the drugs which formed the basis for the indictment. The People opposed petitioner's motion for a hearing on two grounds: (1) the motion papers did not set forth any factual allega-

* Petitioner's motion papers are set forth as an appendix to this brief.



tions raising the issue of a possible Fourth Amendment violation; and (2) petitioner failed to comply with the requirements of N.Y. CPL Section 710.60, in that the motion papers contained no sworn allegations of fact.

In New York, CPL Section 710.60 governs the procedure to be followed with respect to motions to suppress evidence which the prosecution intends to introduce in a criminal case. It provides, in pertinent part, as follows:

> "§ 710.60 Motion to suppress evidence; procedure.
>
> "1. A motion to suppress evidence made before trial must be in writing and upon reasonable notice to the people and with opportunity to be heard. The motion papers must state the ground or grounds of the motion and must contain sworn allegations of fact whether of the defendant or of another person or persons, supporting such grounds. Such allegations may be based upon personal knowledge of the deponent or upon information and belief, provided that in the latter event the sources of such information and the grounds of such belief are stated. The people may file with the court, and in such case must serve a copy thereof upon the defendant or his counsel, an answer denying or admitting any or all of the allegations of the moving papers.
>
> "* * *
>
> "3. The court may summarily deny the motion if:
>
> (a) The motion papers do not allege a ground constituting legal basis for the motion * * *"

Petitioner's motion papers failed to allege a single fact concerning his arrest or the recovery of the narcotics used in evidence against him. Petitioner merely requested that a pre-trial suppression hearing be held without the slightest suggestion that his rights were in any way violated by

the police. Justice Goodman therefore filed an order denying petitioner's motion because there were "no facts raised by the defense to warrant a suppression of evidence" (Pet. A. 1a).* Given such an entirely deficient presentation, the court had little choice but to deny the motion summarily without a hearing pursuant to CPL § 710.60(3). *See People* v. *Glen,* 30 N.Y.2d 252, 262, 331 N.Y.S.2d 656, 664, *cert. denied,* 409 U.S. 849 (1972); *People* v. *Solimine,* 18 N.Y.2d 477, 276 N.Y.S.2d 882 (1966); *People* v. *Leonard,* 33 App. Div. 2d 1010, 308 N.Y.S.2d 77 (1st Dep't), *aff'd,* 27 N.Y.2d 959, 318 N.Y.S.2d 496 (1970).

However, leave was granted to petitioner to renew the motion "upon a proper showing of issues of fact" (Pet. A. 1a). At no time prior to or during the trial did petitioner attempt to avail himself of the opportunity to renew the motion to suppress by submitting proper motion papers. Indeed, at trial, petitioner's counsel specifically rejected a renewal of the suppression motion after learning of the basis upon which the police stopped petitioner's car (T. 7-8; 180-81; 182; 186-87).** Under these circumstances, petitioner waived any right he might have had to a suppression hearing. CPL § 710.70(3). *See People* v. *Esajerre,* 35 N.Y.2d 463, 363 N.Y.S.2d 931 (1974); *People* v. *Berrios,* 28 N.Y.2d 361, 367, 321 N.Y.S.2d at 884, 888 (1971).

## THE EVIDENCE AT TRIAL

### The People's Case

On January 13, 1977, at approximately 2:00 p.m., three New York City police officers assigned to the Anti-Crime Unit of the 5th Precinct in Manhattan were sitting in an

* "Pet. A." citations refer to pages of petitioner's appendix.

** Numbers preceded by "T." refer to the minutes of the trial.



unmarked police car parked in lower Manhattan (Mauriello: T. 33; Forzano: T. 136-37). The officers, dressed in civilian clothes, proceeded to follow a white Grand Prix Pontiac driven by petitioner in which petitioner's father, Raphael Sanchez, was a passenger (Mauriello: T. 34; Forzano: T. 137). They made the decision to follow petitioner based on information personally supplied to two of the officers, Sergeant Forzano and Officer Murnane, less than an hour earlier by an informant known to them* that a male Puerto Rican, driving a white Grand Prix Pontiac with a black top, was carrying a gun (Forzano: T. 150-57; 166-67). After following petitioner's car for several blocks, the driver of the police car obtained petitioner's attention by sounding the horn. Sergeant **Salvatore Forzano** then exhibited to petitioner a police department shield and directed petitioner to pull his car over to the curb (Mauriello: T. 34-35; Forzano: T. 137). After the cars came to a stop, Detective **Neil Mauriello** exited the police car, walked over to the driver's side of petitioner's car, identified himself as a police officer and asked petitioner for his license and registration. Petitioner handed these items to Mauriello and then stood outside of the car while the detective examined them (Mauriello: T. 35; Forzano: T. 137-38).

As Detective Mauriello made a motion toward petitioner with the intention of frisking him for weapons, petitioner immediately bolted and began running down the street (Mauriello: T. 36; Forzano: T. 138). Mauriello and Forzano took up the chase while Murnane stayed behind with Raphael Sanchez. Running behind petitioner, Forzano saw

* Petitioner incorrectly states in his petition that the informant was anonymous. Petition at 5, 8. Sergeant Forzano testified that the informant gave his information concerning petitioner in the presence of both Forzano and Officer Murnane and that the informant was known to Murnane from a previous encounter (T. 150-53).

petitioner reach into his right pocket, remove a softball-sized, round aluminum object and throw it to the ground (Forzano: T. 138-39). Forzano did not stop but instead continued the chase (Forzano: T. 140). Mauriello, who was close behind Forzano, retrieved the discarded object and then renewed his pursuit of petitioner (Mauriello: T. 37-38, 103). Finally, Forzano caught up with petitioner and placed him under arrest. The tinfoil ball was later found to contain 66 packets of cocaine and 5 packets of heroin (T. 114-125).

### The Defendant's Case

Petitioner testified on his own behalf. He stated that after he was stopped by the police he showed his license and registration to Detective Mauriello, who then demanded that petitioner give him "the gun" or else he would beat him (Edgar Sanchez: T. 203). He testified that he then ran because he was afraid of being beaten and that he saw a "silver package" for the first time in the precinct station after his arrest (Edgar Sanchez: T. 205, 211).

**Edwin Rivera**, an acquaintance of petitioner and his family, testified that on January 13, 1977, he saw petitioner running down the street pursued by two men close behind (Rivera: T. 189-191). He testified that he did not see either of the two pursuers with a tinfoil ball but admitted that he did not have a continuous view of the chase (Rivera: T. 194, 198-99).

**Raphael Sanchez** testified that he was in the car with his son. He saw petitioner show his license and registration to the plainclothes officer and then saw him run away (Raphael Sanchez: T. 215-17).



### The Appeal

On appeal to the Appellate Division, First Department, of the New York Supreme Court, petitioner argued that a hearing should be ordered to determine whether the police stopped his car in violation of his constitutional rights. He contended that his admitted failure to comply with CPL Section 710.60 was excusable because he did not know the basis upon which the police stopped his car until mid-trial. He did not contend that CPL Section 710.60 was unconstitutional or that it did not serve any legitimate State purpose. The Appellate Division unanimously affirmed petitioner's conviction without opinion on May 10, 1979 (Pet. A. 2a-3a). The Honorable Sol Wachtler, Associate Judge of the New York Court of Appeals, denied leave to appeal to that Court on June 22, 1979 (Pet. A. 4a).

## POINT I

**This Court lacks jurisdiction to review the questions presented by the petition. In any event, those questions present no issue deserving of review in this Court.**

Petitioner moved prior to trial for a hearing to determine whether physical evidence obtained from him at the time of his arrest should be suppressed. This motion was denied because petitioner failed to comply with N.Y. CPL Section 710.60 in that his motion papers did not raise any issues of fact. At trial, petitioner expressly declined to renew his motion although given the opportunity to do so. Under established New York law, he thereby waived any right he might have had to a suppression hearing. CPL § 710.60(3). *See, People* v. *Esajerre,* 35 N.Y.2d 463, 363

N.Y.S.2d 931 (1974); *People* v. *Berrios,* 28 N.Y.2d 361, 367, 321 N.Y.S.2d 884, 888 (1971).

Petitioner now asks this Court to consider whether his car was illegally stopped and an illegal attempt was made to search him. He also asks review of the validity of New York's rule that he was not entitled to a suppression hearing in the absence of sworn factual allegations making out a Fourth Amendment violation. For neither question is there jurisdiction in this Court. In any event, review of these questions would not serve the purposes of certiorari jurisdiction.

Under 28 U.S.C. Section 1257(3), invoked by petitioner herein, this Court has jurisdiction to review only Federal questions actually passed upon by State courts. If a petitioner failed to raise a Federal question in the State courts, *see, Bailey* v. *Anderson,* 326 U.S. 203, 206-07 (1945), or if the question may not have been decided because of the presence of an adequate and independent State ground for the decision, *see, Fox Film Corp.* v. *Muller,* 296 U.S. 207 (1935), review in this Court is barred. Thus, a petitioner who asks this Court to review the judgment of a State court must demonstrate that the State court ruling rested on Federal grounds. *Street* v. *New York,* 394 U.S. 576, 581-82 (1969); *Stembridge* v. *Georgia,* 343 U.S. 541, 547-48 (1952). Where "it appears that the judgment [of the State court] *might* have rested on a nonfederal ground," this Court will not review the judgment. *Stembridge* v. *Georgia,* 343 U.S. at 547, *supra* (emphasis in original). To give effect to this requirement, the rules of this Court require one who petitions for certiorari to state "the way in which [the federal questions] were passed upon by the [State] court." Supreme Court Rules, Rule 23(1)(f). This, petitioner has failed to do.



In the instant case, petitioner's Fourth Amendment claim need not have been decided in the New York courts, because of the existence of an independent procedural ground for affirming his conviction. In fact, there is every indication that the Fourth Amendment claim was not passed upon. At both the pretrial proceeding and trial, the New York courts expressly declined to rule on the Fourth Amendment claim because of petitioner's failure to comply with the procedural statute.

In his appeal to the Appellate Division, petitioner argued that, under the particular circumstances of his case, the New York procedural rule should not have been applied by the lower courts. The Appellate Division affirmed the conviction without opinion. In doing so, the Appellate Division may have rejected petitioner's procedural argument; there is no suggestion that petitioner's Fourth Amendment claim was considered on the merits by the court. That being the case, review in this Court of the legality of petitioner's arrest and seizure of the drugs is foreclosed by the presence of an adequate, independent State procedural ground. *See, Michigan* v. *Tyler,* 436 U.S. 499, 512 n.7 (1978); *Monger* v. *Florida,* 405 U.S. 958 (1972) (order denying cert.); *Henry* v. *Mississippi,* 379 U.S. 443 (1965). *Cf. Wainwright* v. *Sykes,* 433 U.S. 72 (1977). Petitioner does not claim that New York's procedural rule serves no legitimate purpose, *see Henry* v. *Mississippi, supra* at 447. Such a claim would clearly be frivolous since there is a patent benefit in conducting hearings to determine the admissibility of evidence only where the facts present a serious Fourth Amendment issue.

Nor is there jurisdiction to review petitioner's constitutional challenge to New York's procedural rule. Petitioner appears to argue that the provisions of CPL Section

710.60 are unconstitutional. Petitioner never made this argument in the New York courts, however. Instead, he merely claimed that in the particular circumstances of his case, compliance by him with CPL Section 710.60 should not have been required. He did not claim that the procedural bar in any way abridged his Federal rights. Therefore, no jurisdiction exists to review this constitutional challenge raised for the first time in this Court. *Street* v. *New York, supra.*

In any event, this Court's review of the Fourth Amendment claim or the claim that CPL Section 710.60 is unconstitutional would not serve the purposes of certiorari. Apart from the well-established rules governing frisks of suspects, petitioner's Fourth Amendment claim involves only an issue of law definitively resolved by the Court in *Delaware* v. *Prouse,* 99 S. Ct. 1391, 1401 (1979) just last term. That case involved the issue of Federal law applicable to automobile stops based on less than probable cause. The *Prouse* rule is and has been the law in New York for some years. *People* v. *Sobotker,* 43 N.Y.2d 559, 563-64, 402 N.Y.S. 2d 993, 995-96 (1978); *People* v. *Ingle,* 36 N.Y.2d 413, 419, 369 N.Y.S.2d 67, 73-74 (1975). There is no reason to grant certiorari to determine whether the particular fact pattern in this case falls within the guidelines set in frisk cases and in *Prouse* even if there were jurisdiction to do so. In fact, petitioner's failure to raise the issue below in accordance with New York's procedural rule means that it is quite likely that the present record does not contain all of the relevant facts.

Petitioner's constitutional challenge to the New York procedural statute likewise is not deserving of review. The New York requirement that a defendant raise an issue of



fact in his motion papers before he is entitled to an evidentiary hearing on a motion to suppress is in substance the rule long applied in and approved by the Federal courts. *See, e.g., United States* v. *Culotta,* 413 F.2d 1343, 1345 (2d Cir. 1969), *cert. denied,* 396 U.S. 1019 (1970); *Cohen* v. *United States,* 378 F.2d 751, 760-61 (9th Cir.), *cert. denied,* 389 U.S. 897 (1967); Wright, *Federal Practice and Procedure*: Criminal § 675, pp. 125-26 (1969). Nor can there be a serious question about whether a State may give conclusive effect to a defendant's failure to comply with such a rule. *See Wainwright* v. *Sykes,* 433 U.S. 72 (1977). Finally, there can be no serious issue about whether the procedural rule was unfair as applied to this petitioner. Petitioner had every opportunity to make a proper motion, including an opportunity to renew his motion in satisfactory form at trial after learning of the basis for the police action of which he now complains. Petitioner chose not to do so.

## Conclusion

***The petition for a writ of certiorari should be denied.***

Respectfully submitted,

ROBERT M. MORGENTHAU
*District Attorney*
New York County

MARK DWYER
Assistant District Attorney

MICHAEL E. NORTON
Special Assistant District Attorney

*Of Counsel*

November, 1979

# APPENDIX



## Notice of Motion

SUPREME COURT OF THE STATE OF NEW YORK

COUNTY OF NEW YORK—SPECIAL NARCOTICS PART

Indictment #N1433/77

THE PEOPLE OF THE STATE OF NEW YORK

*against*

EDGAR SANCHEZ,

*Defendant.*

SIRS:

PLEASE TAKE NOTICE that upon the annexed affirmation of KENNETH J. SCHREIBER, and upon all the pleadings and proceedings heretofore had and filed herein, the undersigned will move this Court at a Special Narcotics Part of the Supreme Court, County of New York, Part E, located at 111 Centre Street, New York, New York on the 2nd day of June, 1977 at 10:00 o'clock in the forenoon of that day, or as soon thereafter as counsel can be heard, for an Order in the following form:

1. Granting inspection of Grand Jury minutes and dismissing the indictment herein upon the grounds that the evidence adduced before the Grand Jury was not legally

sufficient pursuant to Section 210.30 of the Criminal Procedure Law;

2. Granting production of a full and complete copy of each and all statements alleged to have been made by the defendant to law enforcement agencies or authorities, in accordance with Section 240.20 (1) (b), Criminal Procedure Law;

3. Granting production of each and all items, statements, records, evidence, and leads to evidence in the possession or within the custody or control of the District Attorney, his agents, and employees, which may be useful for the defense of the charge herein, or in the mitigation of punishment.

4. Granting a Bill of Particulars and Discovery as to the following items, in accordance with Sections 200.90 and 240.20 Criminal Procedure Law.

(a) Set forth the approximate time and location where the defendant was arrested.

(b) Set forth a copy of all scientific reports relating to the contraband that was recovered.

(c) Set forth whether or not the drugs in question were recovered from the defendant; and if not, set forth where the drugs were allegedly recovered from.

(d) A specification of the date, time, place and length of time when the defendant was questioned by law enforcement authorities, after the defendant's arrest, together with the name and shield number of each interrogating



officer, whether or not any statement or admission was obtained.

(e) A copy of any written or recorded statement, confession and/or admission made by the defendant to the District Attorney or any other law enforcement officers.

(f) The names and addresses of anyone present at the scene of the alleged crime.

5. Granting a hearing, pretrial, for the suppression of (1) each and all items of evidence consisting of tangible personal property which was obtained by means of an unlawful search and seizure under circumstances precluding its admissibility pursuant to Section 710.20 (1) and (4) Criminal Procedure Law; (2) each and all items consisting of a record or potential testimony reciting or describing declarations or conversations overheard and/or recorded by means of eavesdropping, under circumstances precluding its admissibility pursuant to Section 710.20 (2) and (4) Criminal Procedure Law; (3) any and all evidence consisting of a record or potential testimony reciting or describing a confession or statement alleged to have been made by any defendant under circumstances casting doubt upon its voluntariness and lawfulness to any person engaged in law enforcement activities, and other evidence obtained in pursuance of such statement of confession all in accord with Section 710.20 (3) and (4) Criminal Procedure Law; and (4) each and all items of potential testimony which purports to identify the defendant as the perpetrator of the crimes charged in the indictment; owing to improperly made previous identification by the particular potential witness, all in accordance with Section 710.20 Criminal Procedure Law.

PLEASE TAKE FURTHER NOTICE that pursuant to Section 240.40 Criminal Procedure Law, this motion requires the District Attorney to continue to promptly disclose any and all additional items, matters or property which may be discovered subsequent to the return date of this motion.

Dated: Queens, N.Y.—May 24, 1977

Yours, etc.

KENNETH J. SCHREIBER
SALAWAY & SCHREIBER
*Attorneys for Defendant*
125-10 Queens Boulevard
Kew Gardens, New York 11415
Tel. #212-793-2700

To:

HON. ROBERT M. MORGENTHAU
District Attorney, New York Co.
155 Leonard Street
New York, New York



## Attorney's Affirmation

SUPREME COURT OF THE STATE OF NEW YORK
COUNTY OF NEW YORK—SPECIAL NARCOTICS PART

THE PEOPLE OF THE STATE OF NEW YORK

*against*

EDGAR SANCHEZ,

*Defendant.*

KENNETH J. SCHREIBER, an attorney duly admitted to practice in the Courts of the State of New York, hereby affirms the following under the penalty of perjury:

1. That I am the attorney for the above named defendant.

2. This affirmed statement is submitted in support of defendant's motion for various forms of relief. For purposes of clarity, the statement will be subdivided into the different areas of relief requested as set forth in the Notice of Motion.

3. The defendant was indicted on the following charge: Criminal Possession of a Controlled Substance in the Fifth Degree and Criminal Possession of a Controlled Substance in the Seventh Degree under indictment #N1433/77.

4. This defendant was arraigned and entered a plea of NOT GUILTY.

5. It is the affirmant's belief that the evidence presented to the Grand Jury did not establish the pre-arraignment intention to sustain the charges under Indictment #N1433/77.

6. Based upon your affirmant's investigation and interview with the defendant, and the facts underlying the charge, and a review of the applicable law, all of which constitute the basis for my information and belief.

7. That upon information and belief, based on the aforesaid investigation, the People have failed to make out a case of Criminal Possession of a Controlled Substance in the Fifth Degree and Criminal Possession of a Controlled Substance in the Seventh Degree.

8. It is therefore requested in Number 1 of the Notice of Motion that the Court grant to the defendant the right to inspect the Grand Jury minutes and dismiss the indictment herein on the grounds that the evidence adduced before the Grand Jury was not legally sufficient pursuant to Section 210.30 of the Criminal Procedure Law.

9. It is clear with the passage of Section 240.20 (1) (b), Criminal Procedure Law, that defendant is entitled, as a matter of right, to a full and complete copy of any and all statements of authorities, in HAEC VERBA if they are recorded and exist, or in substance. I ask for enforcement of this right.



10. Since the decision in *Brady* v. *Maryland,* 373 U.S. 83, the law is clear that the defense is entitled to have the District Attorney search his file and turn over each and all items, leads, evidence or other matters which, in and of themselves, may be helpful to the defense, or which may lead to other items or matters helpful to the defense.

11. The Bill of Particulars is essential in order to enable defendant adequately to prepare and conduct his defense and to preserve due process of law. All of these items pertain directly to the charge at hand, are sought in good faith in aid of making a meaningful and informed defense to this serious charge and can be supplied at no cost, in terms of prejudice, to the People.

12. Section 240.20 Criminal Procedure Law warrants the grant of the discovery items sought in the annexed Notice of Motion.

13. The balance of the motion deals with the various pretrial hearings provided for by the Criminal Procedure Law for the suppression of various kinds of evidence. They depend, to some extent, upon the responses of the People to earlier branches of this motion, and I submit, should be granted to the extent of directing the hearings sought.

WHEREFORE, based upon all of the foregoing, I respectfully pray that the motions set forth in the annexed Notice of Motion be granted in behalf of the defendant.

Dated: May 24, 1977
Queens, New York

KENNETH J. SCHREIBER